THE RECALL—ITS PROVISIONS AND SIGNIFICANCE

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A decade of exposure in the field of American politics brought forth some ugly and insistent facts. In Grover Cleveland's phrase, it is now a condition, not a theory, which confronts the reformers, the builders, those who are seeking to construct anew the foundations of democracy, or representative government, or call it whatever you will. These men have an eye for the effectiveness of their weapons and rather less for tradition or fine logic. No wonder, then, that some institutions appear in the catalogue of remedies which seem ill-harmonized with politics of the text-books.

The recall is one of these practical instruments, and whether we like it or not, it is an emphatic protest against some of our long-standing legal and political traditions. It is radical, revolutionary, in one view, and yet in another it has a certain conservatism of its own, though relying upon an entirely different set of forces from the legal processes which it partially supplements, to prevent abuses. In order, then, to analyze it adequately, this article must treat it both from the practical and the theoretical standpoint.

The Growth of the Idea

For the first legal enactment of the recall principle we are indebted to the charter of Los Angeles, which contained the provisions first in 1903. During the next four years a number of other California cities adopted the idea. In 1906 it was incorporated into the charter of Seattle, Wash. Soon also the initiative and referendum advocates of Oregon became interested in it as a supplement to their own "People's Power" measures, and by employing the initiative, they succeeded in getting it inserted in their constitution in 1908, where it was made applicable to all elective officers, local and general, including the judiciary. It may then be said to be one of the peculiar contributions of the Pacific coast to the present movement, a movement that looks toward a more direct participation of the rank and file of the people in affairs of government.

But the circumstance which gave to the recall its greatest vogue was its incorporation in the commission government laws of Iowa, and almost simultaneously into those of South Dakota and Dallas, Tex. This was in 1907, and ever since it has shared in the publicity which has attended the spread of that form of government. It is, however, not an essential part of the commission plan, and this the Galveston people would have us at all times to understand. But so closely are the two ideas associated that the recall is now a part of every state-wide commission government law, except those of Utah and Kentucky, and of fully three-fourths of the special charters. The relative simplicity of this form has also made the recall a far more feasible and logical adjunct than is perhaps the case with our typical forms of state and local government. For, where, as under the "commission" scheme all the elective officers are directly concerned with public policy, the individual citizen has every reason to concern himself with their official conduct. Moreover, responsibility for the acts of government is so much more definitely fixed that action under the recall is more apt to be well-aimed and effective. And again, the persistent demand for "checks" in our political thinking finds some satisfaction in the recall, when, as under the commission plan, the theory of the separation of powers has been cast aside for a system in which the unity of the organization is bound up in the single group of elective officials.

As a proposition applicable to state officers, it has a slower road to travel. Following the example of Oregon, the nascent State of Arizona sought to make it a part of her system, without taking the precaution of excepting the judiciary. The veto of this measure in its original form and its repassage so as to exclude the judiciary from the recall provisions are a matter of common knowledge and can receive only passing mention here. But the California constitution, by amendment adopted October 10, 1911, permits the recall of all elective officers including judges. Idaho and Nevada will vote in 1912 on similar amendments.

The application of the recall to state officers in its earlier days faced a possible constitutional obstacle in the obligation imposed upon the states to maintain a republican form of government. This difficulty was finally cleared up by the supreme court in the case of The Pacific States Telephone Company *v.* The State of Oregon (223 U. S. 118) wherein it was decided that all questions as to the

form of state government are political and not judicial and lie outside the jurisdiction of the courts.

In the absence of any judicial definition of republican government it is impossible, of course, to determine whether or not the recall is inconsistent with it, and until congress intervenes, the recall is good political practice.

Founded on the Right of Petition

The recall has something more than a mere experimental foundation. As in the case of many another chance creation of politics, it turns out that its fashioners, unconsciously perhaps, have built upon a solid basis of thoroughly accepted political principles which are a vital part of our American political system. And of these principles the first is the well-grounded right of petition, which is one of the chief pillars of our national bill of rights. In the historic sense, this right, to be sure, is limited, and so far as direct remedies are concerned, impotent. The recall amplifies it and makes it dynamic by supplementary provisions. Petitions, thereby, are taken out of the category of publicity schemes, as they were, for instance, when John Quincy Adams was forcing his colleagues in congress into the open on the slavery issue. They are expanded into political instruments capable of producing direct and certain results. They set up a remedy in addition to a right, for under the recall a body of electors may not only express their disapproval of the public course of an officer, but they may carry out their disapproval directly to the point of removal through the mandatory provisions of the law.

In this process the state is more than a passive partner. It goes more than half way to facilitate the exercise of this new right, by becoming accessory in several district processes:

The law supplies the blank forms of petition and requires them to be certified against fraudulent signature.

The law requires a ministerial officer to examine into and certify the sufficiency of the petition to the officer or body authorized to call elections.

The law requires the officer or body in charge of elections to submit the subject matter of the petition to an election, to the voters, and to take all the incidental steps in this action and to incur the attendant expenses.

The law puts into effect, automatically, the mandate of the voters.

Political Character of the Recall

But what of the nature of the petition? Herein is the key to a new conception of elective public office in that a new basis of tenure, short of a fixed term, is set up, a tenure not dependent upon judicial, but upon political considerations. For though elective public office in this country has never been considered in terms of property or contract, there has been heretofore a fixed tradition that removal should be accomplished only by legal formula which may be termed "due process of law." This means the establishment of cause for removal, due notice and a hearing upon charges. Often in practice, the observance of this formula is formal and perfunctory, but the fictions of the law at least are followed.

The recall laws change all this by providing specifically that the subject matter of the petition may be couched in most general terms, for the information of the signers only.[1] It is not to be taken as a series of formal charges. And if this fact in itself is not enough to preclude attacks on the validity of the petition on technical legal grounds, the laws especially provide that this general statement shall not be subject to review in any case. The only "due process" is a political one.

Nor has the political nature of the recall been overlooked in actual practice. In none of the cases in which it has been invoked does there appear to have been any effort to bring to light the definite evidence of malfeasance under the statutory definitions, which would support legal indictment. If such evidence existed in the mayoralty cases in Los Angeles and Seattle, no effort was made to formulate it. And in all the others the action for removal was put entirely upon grounds of public expediency. Thus, in Dallas, in the elections of 1910 and 1911, in each of which two of the school directors were removed, the question at issue was the dismissal of certain teachers. In Tacoma it was that of generally inefficient and inharmonious administration. During the past winter an effort was made in Berkeley, Cal., to remove three school directors on the sole ground that they had dispensed with the services of the superintendent of schools. In Huron, S. D., the removal of the commissioner was sought on the

[1] The charter of Oakland, Cal., has what is perhaps a more equitable provision in this connection, from the standpoint of the officer involved. Under this law the originators of the petition must, before circulating it, give notice of their intention to do so, by filing with the city clerk the reasons for their action. The officer sought to be removed is then allowed to place upon the petition a statement in defense of his course in office.

ground of increase in the tax levy. In the more or less confused contest which took place in Wichita, Kan., the difficulty seems to have been mainly over the submission of a proposition to purchase a public utility plant. Similar issues of policy seem to have underlain the movements which were instituted in San Bernardino, Cal., and in McAlester, Okla., and Shreveport, La.

Recognition of Minorities

The right of petition is essentially a haven for minorities. There is no minority too small to make itself heard in this way. But once the petition becomes a self-executing instrument, as under the recall system, a question arises as to how large a minority need be to gain the official recognition which will set the machinery of removal to work. Practically, the question may be put in this way: When is a petition serious enough to justify the call for a popular election?

To this question, if the recall is to become a permanent feature of our institutions, a good deal of careful consideration must be given. The interest of the people is not only in making public officers responsive to its genuine wishes, but in accomplishing this result with the least possible friction, both to the officers and to the electorate. In making this adjustment the private interests of the officer as such, sink into insignificance. Whatever protection of tenure he gets is incidental to "the larger good." This is the philosophy of the "new democracy" in which the recall is so important an element.

The actual application of the recall principle appears to have reflected a social psychology which makes the adjustment between the interests of the whole people and the demands of the minority, on the basis of local conditions. The importance of the petition is usually measured by the ratio of the number of its signers to the whole number of votes cast in the constituency at the last preceding general election, or the total number cast for the officer in question. When, as in Oregon, California and South Dakota, the socializing influence in politics is noticeably strong, the doubt has been resolved in favor of the whole people. This means a low requirement in the percentage of petitioners. On the other hand, such communities as Illinois, in which a recognition of the recall principle has been wrung from a reluctant legislature, the percentage is prohibitively high. A general average of all the laws would place the percentage

somewhere near twenty-five.[2] Such a figure is not prohibitive and in all the communities in which the recall has been brought to the point of the election, a twenty-five per cent petition has been indicative of a very real public sentiment. In a number of the commission government cities which have this percentage, abortive efforts to remove officers have made their appearance only to be proved ridiculous.[3] Politicians have freely asserted that the recall is a two-edged sword, quite as effective in the hands of unscrupulous trouble-making office hunters as in those of public-spirited citizens. They have worked on this theory in some cases, and with little encouragement, as in the attempt made in Tacoma during the past year to oust the mayor, who had himself been chosen in a removal election. It is the writer's belief, also, that public officers will shortly cease to feel, if they do feel, any insecurity in their positions from the mere fact that a political enemy is seeking to use this public instrument for private ends. Twenty-five per cent petitions are not always easy to secure, even when signatures are purchased, unless the cause is one in which the voters generally take a rather keen interest.

The Expression of Majority Opinion

The placing of a completed petition in the hands of the city clerk or a like officer, fastens upon him the purely ministerial duty of determining, within ten days, its sufficiency, and of certifying the fact to the officer or board empowered to call elections. But during this period every opportunity must be given the signers to put their

[2] Twelve per cent for state officers in California, with special restrictions.

Fifteen per cent under the commission government laws of South Dakota and under the special charters of Oakland, Modesto, Vallejo and Santa Cruz, California.

Twenty per cent under commission government laws of Washington, and the special charters of Grand Junction, Colo., Mankato, Minn., Pontiac, Mich., Fort Worth (registered voters) and Denison, Tex., Parkersburg, W. Va., and Stockton, Cal., Wyandotte, Mich., and Lowell, Mass.

Twenty-five per cent under commission government laws of Montana, Wyoming, New Jersey, Kansas and the special charters of San Luis Obispo and Eureka, Cal., Bartlesville and McAlester, Sapulpa, Okla., and Austin, Tex., Lawrence and Haverhill, Mass., Gardiner, Maine.

Thirty per cent in Ardmore and Enid, Okla., Colorado Springs, Col., and under the Nebraska commission government laws.

Thirty-three per cent under the commission government law of Louisiana.

Thirty-three and one-third per cent under the Wisconsin commission government law, and the special charter of Corpus Christi, Tex.

Thirty-five per cent in Dallas, Tex., Oklahoma City and Tulsa, Okla., Wilmington, N. C., and general commission government law of Idaho.

Forty per cent under the special charters of Holdenville, Okla., and Knoxville, Tenn.

Fifty-five per cent under commission government law of Illinois.

[3] Instances of this character have taken place in Colorado Springs, Des Moines, Haverhill, Tacoma and Seattle.

petition in proper form, and the insufficiency of one petition does not preclude the right to present another.

The functions of the election-calling officer or board are likewise ministerial. If a special election is necessary, as is usually the case, the necessary funds must be appropriated[4] and an election called for a date within the period fixed by law.

In this way the mechanism has been developed to the point where it involves a general popular expression, which it has been the ideal of the recall laws, apparently, never to stifle, but always to facilitate.

But the recall is by no means a broad concession to the revolutionary or "adventurous" elements of the people. Against fictitious expressions of opinion or ill-considered action the laws make a very definite provision. For at the point where the procedure brings the whole electorate for final discussion is placed a barrier against anything like popular passion. This consists of the simple but effective element of time. Every recall law provides that, subsequent to the completion of the petition and before the calling of an election, there must elapse a goodly period of time. This is never shorter than twenty nor longer than ninety days. In this way the recall legislation undertakes in advance to take care of the mob, and its characteristic impulsiveness. Wherever the recall has been invoked, this period has been employed in active and thorough public discussion.

Can a community be maintained at a high pitch of anger, enthusiasm or interest to the detriment of a public officer for a period ranging anywhere between three weeks and three months? Possibly. But, at least, the laws have not neglected this factor. If the official conduct of an officer is sufficient to interest a respectable percentage of the voting community for such a period, the question of his removal by that fact alone, would seem to be a matter of serious public policy. Publicity to the last degree is a well accepted specific for political ills under a democracy. The recall laws make ample provision for this.

This brings us to the manner of removal in the last instance.

The rough analogy between the various stages of the recall processes to "due process" of law under the older forms of removal

[4] The Oregon law requires that the expense of a second election for the recall of the same officer shall be borne by the petitioners, who are required to deposit the necessary amount in advance.

breaks down completely when we consider the manner in which the proposition is placed before the jury of the people on the election ballot.

For at this stage the whole matter is not, as a rule, put up to the voter as a simple, unmixed issue of removal as against removal.[5] It is the question of retaining the incumbent in office or electing a successor. When the process of petitioning is over the officer under attack is given an option between resigning and becoming a candidate for the job of filling his own office for the remainder of his unexpired term. He is, in fact, such a candidate and his name is placed upon the ballot, unless he expresses a wish to the contrary. The petitioners who often, as a matter of practice, constitute a more or less distinct faction, or temporary party, proceed to nominate an opponent by petition.

Upon the ballot, provision is usually made for a statement of the reasons for the sought-for removal, and the counter statement of the officer, justifying his course in office. These recitals, as in the original petitions, because of their brief and general character may take on a decided political color.

As to the sufficiency of the final verdict of the electorate, most of the laws require that the successful candidate shall receive a majority of all votes cast; the remainder stipulate the highest number of votes after the practice of regular elections. In either case the number may be considerably less than was required for choice at the original regular election, for of the laws in effect, none thus far fixes a minimum number of votes to establish the validity of a removal election.

Such, in general, is the groundwork of recall legislation. Minor features have been added from time to time to some of the laws. One of these protects the officer for a given period from recall, after the beginning of his term of office. In most cities this is from three to six months. Under the New Jersey commission government law it is one year, the whole term of office being four years in this case.

By charter amendment in 1911 the city of Los Angeles has extended the recall to all appointive officers. This is a step which suggests a series of very debatable questions from the standpoint

[5] There are exceptions to this rule however. Under the charters of Austin, Tex., and those of Sacramento and Modesto, Cal., the question of removal is presented as an entirely separate one from the election of a successor. The Los Angeles Charter Revision Committee contemplates a similar change.

of responsibility which cannot be dealt with here. The new commission government law for Mississippi has a like provision. The new charter of Lawton, Okla., attempts to meet the objections to irresponsible petition-peddling by requiring every signer to appear in person at the city hall when affixing his signature.

An important variation from the typical plan outlined above is found in the Boston charter, adopted in 1909. This is based upon a rather different theory of official tenure. Under this act the mayor is elected for a term of office of four years, unless recalled at the end of the second year. No petition is necessary to submit the proposition to the voters; it is put in the ballot as a matter of course. Unless the mayor is recalled by an advance majority vote, he becomes by tacit consent of the electors, as it were, his own successor. But the Boston arrangement is not only a variation from the general plan in form. It fails to provide the machinery for continuous control by the electors, which is the very essence of the recall principle.

Wider Significance of the Recall

So much for the mere machinery of this new political instrument. There are those who speak of it as a "device" or a "nostrum," implying that it is but an ingenious invention of more or less unbalanced revolutionists. They speak of it as an agency for undermining and destroying our existing system of government. Perhaps, in a measure these critics are right. Certainly its underlying political philosophy points to a radically new conception of the ends of democratic government, as compared with the philosophy underlying our jurisprudence. The acceptance of the recall principle implies a complete revamping of the theory of public office tenure. The new system of laws has socialized, within their limitations, our conception of public service. Every other form of removal in American practice lays emphasis on certain colorable rights of the public officer; not the right of property in the office, not the rights of one party to a contract, but a presumption in favor of the officer's title to his position as against the interest of the public in his removal. A public officer once chosen by the people—a political process—has heretofore been from the moment of his election, entrenched behind legal immunities, based upon the theory that removal should be effective for specific cause and only after due notice and an opportunity to be heard in one's own defense. On top of this primary rule was a galaxy

of minor technicalities in procedure. The modern idea favors public interest as against what were supposed to be private rights, and political action as against legal obstacles to action.

This theory, moreover, has been largely borne out in practice. A review of the earlier cases in which the recall has been invoked brings these two conflicting theories into graphic relief. The office holder, just as soon as the recall movement has attained a serious momentum will, almost inevitably, be found resorting to the familiar expedients of the law courts. He has sought to fortify his rights, and he does so, boldly ignoring the real issue, which is the political one. But the spirit, as well as the form of the laws, is against such an attitude of mind, and it seems likely that every doubt as to procedure will be resolved by the courts in the interest of the public as against the so-called rights of the officer. And so, the recall, in a humble way, may be pointing toward a new theory of jurisprudence in which the balance will be in favor of social good as against private rights and immunities.

The successful extension of the recall principle will doubtless depend upon a simplification of present electoral arrangements. And not until this simplification is accomplished; not until a clear distinction is made between merely ministerial and genuinely political, or policy determining officers is made, will the new theory of continuous control be able to work under the most favorable conditions. By the side of the direct legislation movement fortunately goes the movement for the "short ballot," which, if its friends prevail, will result in removing from the voters' direct selection all purely administrative and, in fact, in some cases, judicial officers, and leave on the ballot only those who shall be concerned directly with public policy. It is significant that thus far, the actual operation of the recall has been confined largely to "short ballot" cities.

Likewise, the dominant traditional theory of representation is profoundly disturbed, especially when we take the recall in connection with the initiative and referendum. If we take the view of the framers of the federal constitution, representative government meant the rule of a very superior few, whom the multitude might select, but, who during a fixed term of office, were to be immune from popular attack or control. Legislative bodies, in this spirit, have steadfastly asserted the right to control membership within their body and, by the terms of the written constitution, are traditionally

immune from removal by any outside agency. There has been little to suggest that the great body of the people had any concern in the great business of government except as they may silently cast their ballots for substitutes in the executive and legislative halls, much as one would select a substitute at the battle front.

This conception, too, must continue to operate as the normal condition of representative government. But under a system of which the recall is a part, it must be subject to suspension in matters of great and vital public concern. Against the traditional theory the recall opposes the doctrine and the instrumentalities of direct and continuous control over the agencies of government—control which is seemingly dormant for the greater part of the time, but which is always on call, ready to be brought into action at any moment. To this extent, wherever the new expedient has been adopted, there certainly has been a change in the form and spirit of our government and it is one which is calculated to strike terror in the hearts of every good Tory. But the matter of mere form is of minor importance as compared with the substance of democracy. In fact, it is quite possible to regard the "People's Power" agencies in the light of a fulfilment of a promise of genuine popular rule given by our state and federal constitution, but never realized in the fullest application until now, because of the defectiveness of the instruments which were employed.